STATE OF MICHIGAN

COURT OF APPEALS

FLORINE BURKS,

Plaintiff-Appellee,

v

ROBERT T. KIMBROUGH,

Defendant,

and

A.C.I.A.,

Defendant-Appellant.

UNPUBLISHED
August 4, 2009

No. 282229
Wayne Circuit Court
LC No. 05-527325-NI

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

In this automobile negligence action, defendant A.C.I.A. appeals as of right from a judgment for plaintiff, entered on a jury's finding that plaintiff Florine Burks sustained injury while alighting from a vehicle. We affirm.

On June 22, 2005, plaintiff and her daughter, Joi Burks, drove to the grocery store in Joi's four-door Ford Taurus. When Joi drove home, plaintiff sat in the back seat directly behind the driver's seat, next to her bags of groceries. Joi parked in front of plaintiff's home, exited the car, and instructed plaintiff to open the Taurus's back driver's side door. Once plaintiff had opened the door, Joi activated the car's automatic locking system and went inside the house. Moments later, defendant Robert Kimbrough's uninsured vehicle struck plaintiff.

Plaintiff submitted a claim to A.C.I.A., Joi's insurer, for personal injury protection (PIP) benefits pursuant to the no-fault act, MCL 500.3101 *et seq.* A.C.I.A. denied payment on the ground that plaintiff had failed to establish a relationship between her injuries "and our insured's vehicle as [plaintiff] was standing in the street when she was hit by another vehicle." In September 2005, plaintiff sued A.C.I.A. seeking payment of PIP benefits.

After concluding discovery, A.C.I.A. filed a motion for summary disposition premised on MCR 2.116(C)(8) and (10), alleging that plaintiff's injury did not arise from the "ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle," as required by MCL

500.3106(1). A.C.I.A. insisted that plaintiff had failed to demonstrate that she sustained injury while "occupying, entering into, or alighting from" Joi's vehicle. MCL 500.3106(1)(c). The trial court granted A.C.I.A.'s motion on the basis that no question of fact existed regarding whether plaintiff "was inside of, preparing to alight from, or in the process of alighting from the car at the time of the impact." Plaintiff filed a motion for reconsideration, which the trial court granted. The order granting reconsideration explained,

> Upon reconsideration, the Court is of the opinion that there is a genuine issue of material fact regarding whether or not Plaintiff was in the process of alighting from the parked vehicle at the time of the accident. Although Plaintiff testified that she had closed the car door prior to being struck, she also testified that when she saw Kimbrough's car, she "pushed the door back and got as close to the car as (she) could." Plaintiff was unable to recall how much time elapsed between the time she closed the door and the time of the accident.

The parties stipulated that plaintiff had incurred damages of $33,500, exclusive of interest and attorney fees. After a brief trial, a jury answered affirmatively the following question: "Was the plaintiff alighting from the vehicle when her injury occurred?"

A.C.I.A. contends that the trial court erred by denying its motion for summary disposition and its motion for a directed verdict. This Court reviews de novo a trial court's summary disposition ruling.[1] *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id*. To the extent that our review involves statutory interpretation of the no-fault act, we consider such legal issues de novo. *Kreiner v Fisher*, 471 Mich 109, 129; 683 NW2d 611 (2004).

We also review de novo a trial court's ruling on a litigant's motion for a directed verdict. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999). In reviewing a directed verdict ruling, this Court examines the evidence presented and all legitimate inferences arising therefrom in the light most favorable to the nonmoving party. *Farm Credit Serv's of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 668; 591 NW2d 438 (1998). "A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ." *Candelaria*, *supra* at 71-72. "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). The "appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Serv's, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

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[1] Because the trial court considered evidence beyond the pleadings, we treat its summary disposition ruling as premised on MCR 2.116(C)(10).

The portion of MCL 500.3106 implicated in the parties' dispute provides,

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur.
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> * * *
>
> (c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

"The underlying policy of the parked motor vehicle exclusion of subsection 3106(1) is to ensure that an injury that is covered by the no-fault act involves the use of the parked motor vehicle *as a motor* vehicle." *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 633; 563 NW2d 683 (1997) (emphasis in original). "[W]here an injury occurs that is related to a parked motor vehicle, subsection 3106(1) requires that there be a sufficiently close nexus between the injury and the use of the vehicle as a motor vehicle to justify recovery." *Id*. at 635.

A.C.I.A. maintains that because plaintiff "had both feet planted on the ground" when Kimbrough's vehicle struck her, she was not "alighting from" Joi's vehicle within the meaning of subsection 3106(1)(c). A.C.I.A. relies primarily on this Court's opinion *Krueger v Lumbermen's Mut Cas & Home Ins Co*, 112 Mich App 511, 515; 316 NW2d 474 (1982), in which we observed, "There is no statutory definition of the term 'alighting' and little case law." This Court determined that it was "unnecessary to attempt a complete definition of the term at this time," but concluded that "an individual has not finished 'alighting' from a vehicle at least until both feet are planted firmly on the ground." *Id*. According to defendant, "a person has finished 'alighting from' a motor vehicle when she has removed herself from the physical confines of the vehicle and has both feet firmly planted on the ground." However, we decline A.C.I.A.'s invitation to interpret *Krueger* as creating a bright-line rule precluding coverage under subsection 3106(1)(c) whenever a claimant has "two feet … planted firmly on the ground." As we have observed, this Court in *Krueger* expressly refrained from "attempt[ing] a complete definition" of the term "alighting," and explained only that the process was incomplete "*at least*" until both feet firmly contacted the ground. *Id*. at 515 (emphasis added).

Furthermore, in *Hunt v Citizens Ins Co*, 183 Mich App 660; 455 NW2d 384 (1990), this Court recognized that a claimant may have both feet firmly planted on the ground while in the process of entering, and by analogy alighting from, a vehicle. The plaintiff in *Hunt* "had the car keys in his hand and his left hand on the car door when he was struck by another vehicle." *Id*. at 663. This Court reasoned that the plaintiff had been "in the process of entering into the vehicle," and further explained that "being struck by another vehicle is foreseeably identifiable with the act of entering a vehicle which is parked in the street." *Id.* at 664. Because a "sufficient causal nexus" existed in *Hunt* between the plaintiff's use of his motor vehicle and his injury, this Court held that the injuries arose from "the ownership, operation, maintenance, or use of a parked vehicle[.]" *Id*., citing MCL 500.3105(1).

Here, plaintiff similarly testified in deposition and at trial that she got out of the Taurus and turned around to remove her bags from the back seat. She first saw the car that struck her when "it was right up on me." At that point, plaintiff "like pushed the door back and got as close

to the car as I could," which she elaborated at trial as signifying, "I braced my body up to the car . . . . I had to get my body where I thought I'd not be hit." Plaintiff answered affirmatively when asked at her deposition, "You were still in the process of getting out?" and at trial when asked, "You were still attempting to finish alighting, close the door so you could get in your house?" Viewed in the light most favorable to plaintiff, this testimony establishes that plaintiff suffered injury while in the process of alighting from the Taurus. Plaintiff's testimony reflects that she had not managed even an initial step away from the Taurus with her groceries, but remained in the process of completing her exit from the Taurus when the uninsured vehicle struck her.

In conclusion, a person may have two feet on the ground while still removing packages from a car, closing or locking a car door, or otherwise preparing to complete an exit from a vehicle. Because the evidence concerning plaintiff's actions reveals a foreseeable causal nexus between her injury and her use of the Taurus, the trial court correctly denied A.C.I.A.'s motions for summary disposition and judgment notwithstanding the verdict.

Affirmed. As the prevailing party, plaintiff may tax costs under MCR 7.219.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher